

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of ARM)	NOTICE OF PUBLIC HEARING ON
New Rules I through VIII and repeal of)	PROPOSED ADOPTION AND
4.12.1320, 4.12.1321, and 4.12.1432)	REPEAL
relating to quarantines and pest)	
management standards)	

TO: All Concerned Persons

1. On March 5, 2009, at 3:00 p.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 303 N. Roberts at Helena, Montana, to consider the proposed adoption and repeal of the above-stated rules.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on February 26, 2009, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov.

3. Economic Impact Statement: These rules provide the basic framework for Department of Agriculture quarantines. These rules have no economic impact. As long term quarantines are implemented through future rulemaking processes, they will each have an economic impact statement.

Individual quarantine rules, themselves, will generate no automatic revenue. All civil penalties, while revenue, are deposited into the general fund. The department issued a civil penalty for violations of a federal quarantine in 2008 for \$3,000. Civil penalties for violations of a quarantine are not expected to be more than \$3,000 per fiscal year. The department would expect to receive recovered expenses for mileage, per diem, lodging, and other actual expenses. These expenses can not be estimated as they would be specific to the individual quarantine. Quarantines may affect a small area of the state such as a field or a county, the entire state, or areas outside the state. Traditional, nontraditional, and specialty crops could, possibly, be impacted by an individual quarantine rule. Economic impact of a quarantine can not be calculated without specific information on the pest of concern, the affected crops, the individuals or businesses involved, the size of the area quarantined, and the types of actions and measures needed to prevent introduction, eradicate, or slow the spread of a quarantine significant pest.

4. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS (1) "Article" is any item subject to a quarantine.

(2) "Department" means the Department of Agriculture.

(3) "Accredited Certifying Official (ACO)" is a federal, state, or county official accredited to perform phytosanitary inspections and sign phytosanitary certificates for commodities meeting phytosanitary requirements.

(4) "Fomite" is any inanimate object or substance capable of carrying an organism, functions to transfer an organism, or in any other way acts as a nonliving vector of a pest.

(5) "Location" is any place where quarantine pests, quarantine articles, plants, plant propagative material, plant products, and other associated items or materials are. This includes, but is not limited to, businesses; fields; gardens; production areas; propagation areas; greenhouses; processing facilities; places where regulated articles or plants are kept, sold, traded, bartered, used, given away, or distributed; and all conveyances.

(6) "Long-term quarantine" is a quarantine that lasts over 12 months.

(7) "Permit" is a written authorization issued by the department, another state, or the federal government and is approved by the department for the movement of any prohibited or restricted plant pests or quarantined articles.

(8) "Phytosanitary documentation" is legal paperwork certifying that visual inspections have been completed by a state or federal official and that all other requirements such as, but not limited to, surveys, laboratory tests, and treatments, have been met.

(9) "Phytosanitary inspection" is an inspection conducted by an individual trained and certified to determine if prohibited materials or organisms are present or to take official samples to be examined by a qualified individual or an accredited laboratory elsewhere.

(10) "Phytosanitary measure" is an action taken to assure that prohibited materials and/or organisms are not present in or on plants or plant materials.

(11) "Plant matter" is any plant species that includes, but is not limited to, agricultural, forest, range, nursery, or ornamental species; soil; fruit, vegetables, seeds, or nuts; any other plant part or propagative material; or plant product. This includes house, greenhouse, hothouse, potted (regardless of planting medium), bareroot, aquarium, pond or other water related, and windbreak plants.

(12) "Plant pest" is any organism that can directly or indirectly injure or cause damage in or to a plant, plant propagative material, or a plant product including, but not limited to, an insect, weed, fungus, virus, bacteria, parasite, pathogen, nematode, vector or other organism that meets the criteria as a pest established by department rule.

(13) "Proper documents" is a copy of the original invoice listing the origin of the articles, quantity and value of articles, location where the articles are destined to arrive, anticipated date of arrival, and/or other requirements specified under a quarantine.

(14) "Quarantine" is a rule, order, or other legal instrument duly imposed or enacted by the department on regulated areas or articles.

(15) "Quarantined article" is anything covered by a quarantine order in [New Rule II, New Rule III], or an emergency declared by the director of the Department of Agriculture.

(16) "Regulated area" is an area into which, within which, and/or from which plants, plant products, and other regulated articles are subject to phytosanitary measures or a quarantine to prevent the introduction and/or spread of quarantine pests.

(17) "Regulated article" is any plant, plant matter, container, conveyance, or any other object or material capable of harboring or spreading plant pests, and that is subject to phytosanitary measures or a quarantine.

(18) "Short-term quarantine" is a quarantine that lasts 12 months or less.

(19) "Vector" is an organism that transmits a pathogen.

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: New Rule I establishes definitions to support the rules.

NEW RULE II ESTABLISHING A QUARANTINE (1) The director of the Department of Agriculture or his/her designated representative may establish or modify a quarantine by signing an order. The order will specify what is to be quarantined, the quarantine requirements, and the length of the quarantine.

(2) A long-term quarantine shall be adopted into rule, but is effective upon signature of the director or his/her designated representative.

(3) A list of quarantines is available by contacting: Montana Department of Agriculture, Agricultural Sciences Division, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-7336; e-mail: agr@mt.gov, or through the department's web site: www.agr.mt.gov.

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: New Rule II describes who may establish or modify a quarantine, requires that long term quarantines be adopted as an administrative rule, and tells the reader who to contact for a list of plant pest quarantines.

NEW RULE III NOTIFICATION OF IMPORTS (1) Anyone who transits or imports quarantined articles for use, sale, resale, or distribution shall provide notice and required proper documents to the department by mail, fax, e-mail, or other approved method.

(2) The department must be in receipt of all proper documents at least 48 business hours before bringing the items into the state. Business hours are Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding state holidays.

(3) Under no circumstance may the imported item(s) be unloaded within the state until the department receives the proper documents and authorizes entry of the regulated articles.

(4) The department may notify the shipper or the receiver that the imported or transiting items cannot be brought into the state, must be removed from the state, must be inspected, or must show that it has met any requirements the department deems necessary.

AUTH: 80-7-402, MCA
IMP: 80-7-402, MCA

REASON: New Rule III provides the opportunity for individuals, industries, and educational institutions to transit or import prohibited articles under quarantine in a manner that mitigates the pest risk to agricultural industries and the environment in the state.

NEW RULE IV PERMITS (1) The quarantine order or rule may specify the type and kind of permit required for import, export, transit, movement, handling, or other actions of regulated articles. Permits may require actions by the permittee or department such as, but not limited to, inspection, sampling, analysis or testing, cleaning, decontamination, treatment, covering/sealing, destruction or disposition, safeguarding, or other services or actions to mitigate the pest risk and protect the state and its resources.

(2) At the department's discretion, the department may recognize and grant reciprocal permit agreements with other units of government through a written memorandum of understanding. Such agreements will, at a minimum, specify the unit of government and duration of the agreement and provide for termination of the agreement at the discretion of the department.

(3) All permits are subject to department oversight and may be subject to audit or inspection to ensure conformance with all permit conditions.

(4) Any permit may be canceled by the department at any time.

(5) Permits may have an associated fee. Permit fees will be specified in each quarantine order.

(6) Permits may require bonding, the amount of which will be determined by the risk associated with such a permit.

(7) If no permit is specified, then the quarantined item in question cannot be imported, exported, transported, or moved into, through, out of, or within Montana, without specific written authorization by the department.

AUTH: 80-7-402, MCA
IMP: 80-7-402, MCA

REASON: New Rule IV provides for actions or services related to handling or movement of quarantined plant matter and regulated articles and describes the types of permits, allows for permit fees, reciprocity with other units of government and describes the conditions under which prohibited or restricted articles require inspection, what safeguards must be taken to prevent plant pest dissemination, disposition conditions of articles that are prohibited or restricted, and handling costs incident to the inspection, handling, cleaning, safeguarding, treatment, or other services required to mitigate the pest risk.

NEW RULE V INSPECTIONS (1) The department may inspect at any time, without notice, any business, location, conveyance, or records relating to such a business, location, or conveyance of:

(a) Any individual, business, distributor, or shipper that sends them a notice of import and the receiver of such imports.

(b) Any permit holder or anyone who has had a permit in the previous 24 months.

(c) Any person involved in the import or export of any plant, plant matter, plant part, plant product, or other regulated article subject to a quarantine.

(d) Any location that has, grows, propagates, processes, distributes, sells, trades, barter, uses, or gives away a plant, plant matter, plant part, or plant product subject to a quarantine.

(2) Inspections are only for the purposes of investigating compliance with these rules and to ensure the department's quarantines are effective.

(3) The department may conduct inspections on any person, place, or item if the department has reason to believe it contains material in violation of a quarantine.

(4) The department may recover actual costs of inspections.

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: New Rule V provides the authority to conduct inspections to ensure compliance with state and federal quarantines and mitigate actual or anticipated pest risk and threat to an agricultural or environmental interest.

NEW RULE VI COMPLIANCE AGREEMENTS (1) The department may enter into a compliance agreement with any person.

(2) Compliance agreements may be used to meet quarantine requirements that facilitate import, export, handling, and movement of quarantine articles or items.

(3) Anyone who enters into a compliance agreement with the department must be able to demonstrate that they can meet or exceed all state and applicable federal requirements and must:

(a) Have good standing with the department.

(b) Not have an outstanding or past due account for any department program, service, or area of authority.

(c) Have all required licenses and/or registrations for all department programs and services.

(d) Not have any record of violation pertaining to a quarantine.

(e) Not have a record of any violation within any statute, administrative rule, procedure, or policy for which the department has authority and jurisdiction that:

(i) has occurred within the last two years; or

(ii) is a repeat violation, occurring during the past five years.

(f) Not have a record of any violation with any statute, administrative rule, procedure, or policy, within any state, that parallels a responsibility under the proposed compliance agreement.

(g) Have had no permit, agreement, or other authority rescinded, suspended, revoked, or terminated for cause.

(h) Meets all education, training, certification, accreditation, or other requirement to perform proposed activities or services.

(4) The department may require a bonded compliance agreement for certain activities.

(5) The department may charge a fee for a compliance agreement. The fee will be specific to the type and scope of the compliance agreement actions or services.

(6) The department may recognize and grant reciprocal agreements with other units of government provided the above conditions are met both in Montana and the state in which the person resides.

(7) All compliance agreements are subject to department oversight and may be subject to audit or inspection to ensure conformance with all compliance agreement conditions.

(8) All compliance agreements may be canceled by the department at any time.

AUTH: 8-7-402, MCA

IMP: 8-7-402, MCA

REASON: New Rule VI allows the department to enter into a compliance agreement with any person to meet quarantine requirements. A compliance agreement may cover actions that might be required of a person multiple times and at predictable intervals such as a regularly needed permit or notification or may cover multiple requirements such as permits and notifications.

NEW RULE VII VIOLATIONS AND PENALTIES

(1) Violation Schedule	1st Offense	Subsequent Offense
(a) Knowingly bringing plants, plant matter, propagative plant parts, plant products, or any associated material into the state that is diseased, infected, or infested whether it is quarantined or not.	\$1,000	\$1,000
(b) Bringing a quarantined regulated article into the state without a required permit.	\$ 750	\$1,000
(c) Failure to obtain a permit.	\$ 500	\$1,000
(d) Failure to have a required permit or other required document with a quarantined item.	\$ 500	\$1,000
(e) Failure to provide required notification.	\$ 500	\$1,000
(f) Failure to follow any required safeguard.	\$ 500	\$1,000
(g) Failure to keep required records.	\$ 500	\$1,000
(h) Failure to release or allow access to records pertaining to a quarantine, order, permit, or compliance agreement.	\$ 500	\$1,000
(i) Falsifying any record or document related to a quarantine, order, permit, or compliance agreement, including, but not limited to all sales, handling, shipping, transporting, importing, and		

exporting and any invoice, bill of lading, permit, seal, or certificate.	\$1,000	\$1,000
(j) Interfering with or preventing an inspection or investigation.	\$1,000	\$1,000
(k) Failure to be in compliance with a quarantine requirement.	\$1,000	\$1,000
(l) Noncompliance with any state or federal quarantine, order, permit condition or requirement, or compliance agreement.	\$1,000	\$1,000
(m) Any other violation of the Quarantine Act or these rules.	\$1,000	\$1,000
(2) Violation of a quarantine permit, import permit, or compliance agreement may result in suspension of a permit or compliance agreement or denial of a future request for a permit or compliance agreement.		
(3) Anyone who violates these rules is acting negligently, if not intentionally, and is liable for all harm they cause and may be liable for all costs associated with, but not limited to, trapping, monitoring, surveying, analysis, testing, containment, eradication, control, management, disposition, destruction, restoration, and other measures deemed necessary by the department.		

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: New Rule VII is mandated by 80-7-404(3), MCA, to establish by rule a penalty schedule and other matters necessary to enforce civil penalties.

NEW RULE VIII PLANT HEALTH QUARANTINES (1) All quarantines are listed by the name of the quarantine and references the quarantine order number. The order will specify the name of the quarantine and describe the plant pest(s), regulated articles, and regulations, e.g., notifications, inspections, sampling, certifications, required permit(s), safeguards, and any other requirements.

(2) Quarantine orders are available from the department by accessing the department's web site at www.agr.mt.gov or by requesting a copy of the order by writing, e-mailing, or faxing a request to the Department of Agriculture at P.O. Box 200201, Helena, MT 59620-0201; agr@mt.gov; or (406) 444-5409.

(a) The department may charge actual costs of printing, copying, and mailing copies of a quarantine rule or order.

(3) The following is the current list of long-term quarantines:

(a) European Pine Shoot Moth (EPSM) (*Rhyacionia bouliana*). See Order MTQ-2008-01.

(b) Late Blight Quarantine, (*Phytophthora infestans*), See Order MTQ-2008-02.

(c) Japanese Beetle, (*Popillia japonica*), See Order MTQ-2008-03.

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: New Rule VIII lists the current quarantines and their associated quarantine orders, describes the elements to be found in a quarantine order, and tells the reader how to access the orders.

Economic Impact Statement for European Pine Shoot Moth (EPSM) (*Rhyacionia bouliana*), Order MTQ-2008-01: These rules will not generate any automatic revenue. The European Pine Shoot Moth Quarantine is an exterior quarantine, meaning that the restrictions apply only to other states known to have EPSM. Imports into the state of Montana will require a permit/certification of import materials from the export state's Department of Agriculture. The cost of such permit/certification is dependent upon the export state's fees and are the responsibility of the exporter.

Failure to create this quarantine may lead to losses not only in the nursery landscape industry but the timber industry as well. The nursery industry represents Montana's fifth largest source of agricultural income, which generated \$33,832,000 in 2002 (2002 Census of Agriculture State Profile, http://www.nass.usda.gov/Statistics_by_State/Ag_Overview_MT.pdf). Christmas tree sales, an area where this insect can have a major impact, contributed an additional \$632,000 (2002 Census of Agriculture State Profile) in agricultural income during that year. Impacts on the timber industry are more difficult to measure. Irregular branching of individual trees in small numbers can be tolerated. However, in an area with a large infestation of EPSM, irregular branching of a high percentage of the standing crop could easily lead to the timber in that area being unacceptable for timber harvest. This in turn could lead to an increased risk of other insect outbreaks, disease outbreaks, and fire.

Economic Impact Statement for Late Blight Quarantine (*Phytophthora infestans*) Order MTQ-2008-02: These rules will not generate any automatic revenue. The Late Blight Quarantine is an exterior quarantine, meaning that the restrictions only apply to other states known to have Late Blight. Imports into the state of Montana will require a permit/certification of import materials from the export state's Department of Agriculture. The costs of such permit/certification are dependant upon the export state's fees and are the responsibility of the exporter.

Failure to create this quarantine may lead to severe losses in the seed potato production areas of the state. Montana producers plant and harvest almost 10,000 acres of potatoes each year. The annual sales revenue from these acres was over \$38 million in 2007. Late Blight disease of potatoes is easily spread by both wind and water when weather conditions are favorable. Infected tubers can not be sold for seed and as a result would be sold into the fresh or processing market, decreasing the economic return. Selling potatoes intended for seed as fresh or process market potatoes could reduce the value of the crop by as much as 50 percent.

Economic Impact Statement for Japanese Beetle Quarantine, Order MTQ-2008-03: These rules will not generate any automatic revenue. Japanese beetle

has been detected in the Billings area consistently for the past six years. The number of beetles detected through trapping has increased, indicating the beetles are more than seasonal hitchhikers of commercial aircraft associated with the Billings airport. The state is considered a category one protected state. This status provides protective measures through restrictions on imports into the state from infested areas outside the state, as outlined by USDA. However, to maintain that status and thus the protection it offers, the state must demonstrate continued "apparent freedom from" based on annual trapping results and must eradicate detected Japanese beetle in order to maintain our protected state status. Concurrent with eradication efforts in the affected area, the state is enacting a long-term, interior Japanese beetle quarantine that will affect regulated areas of Yellowstone County. The quarantine restricts the sale, shipment, and movement/transport of plants, growing media, and mulch from the regulated area to prevent or minimize the spread of Japanese beetle to other areas of the state. As such, the rule may impact landowners or managers within the regulated area who may wish to move regulated articles out of the quarantined area. There are at least 660 parcels of land within the regulated area. It is not expected that all landowners/managers will wish to move a regulated article out of the regulated area. There is, however, no reasonable way to estimate just how many such actions might be desired by the landowners/managers. Movement of regulated articles will require documentation of "apparent freedom from." This may be accomplished through an approved trapping/monitoring program; an inspection of regulated articles by a Department of Agriculture authorized representative; or a state or federal phytosanitary certificate attesting to "apparent freedom from."

The cost of trapping and monitoring is based on the size of the area. Trapping requires one trap per 13 acres. Traps cost \$16 and lure cost \$2. Lure will last approximately 3 weeks. The cost of trapping a 13 acre area from May through September is \$30 (\$16 for the trap and \$14 for lure). Trapping/monitoring would need to result in negative finds of Japanese beetle in order to attest to "apparent freedom from." An inspection may serve to attest to "freedom from" provided such inspections result in negative observation of Japanese beetle larvae or adults. Inspection costs will vary depending on the amount of material to be inspected and time necessary for oversight of any required treatment. Actual costs of inspection typically include per diem, mileage, and an hourly charge.

Growing media, manure, compost, humus, and mulch and plants in a growing media will require treatment. This will predominately be done by chemical application. Cost to landowners or managers for chemical treatment of materials is largely dependent upon the volume to be treated, product used for treatment, and whether a commercial applicator is hired to treat or an authorized department representative needs to witness the treatment. Although alternative, nonchemical treatments are allowed, being able to meet conditions may make them unfeasible. Such requests will be considered on a case-by-case basis and the cost will depend on any number of variables associated with the proposal.

5. The department proposes to repeal the following rules:

4.12.1320 DEFINITIONS, JAPANESE BEETLE QUARANTINE

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: Existing rule 4.12.1320 supports ARM 4.12.1321, which is in conflict with the federal quarantine for Japanese beetle. Repealing ARM 4.12.1321 makes ARM 4.12.1320 unnecessary.

4.12.1321 INTERSTATE AND INTRASTATE QUARANTINE PERTAINING TO JAPANESE BEETLE (*POPILLIA JAPONICA*)

AUTH: 80-7-402, MCA

IMP: 80-7-402, MCA

REASON: Existing rule ARM 4.12.1321 is in conflict with the federal quarantine for Japanese beetle.

4.12.1432 PREVENTING SPREAD OF LATE BLIGHT DISEASE OF POTATOES (*SOLANUM TUBEROSUM* L.)

AUTH: 80-7-121, MCA

IMP: 80-7-121, MCA

REASON: Existing rule ARM 4.12.1432 is invalid since the authorizing statute was repealed.

6. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may be submitted to: Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov. Any comments must be received no later than March 12, 2009.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail, and mailing address of the person and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Notice of Public Hearing on Proposed Adoption and Repeal is available through the department's web site at www.agr.mt.gov, under the Administrative Rules section. The department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified on December 30, 2008 by regular mail. For previous rule projects involving the same bill, the primary sponsor was given appropriate notice.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, February 2, 2009.